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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1254

JOSEPH SMITH, SHERIFF OF
WORCESTER COUNTY,
APPELLANT,

v.

VALARIE GOGUEN,
APPELLEE.

REPLY BRIEF FOR APPELLANT

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Argument

I. THE ISSUE OF EXHAUSTION OF STATE REMEDIES IS PROPERLY BEFORE THIS COURT.

Appellee argues to this Court that appellant has waived any right appellant had to rely upon the doctrine of exhaustion of state remedies as codified in 28 U.S.C.

2254(b). He argues that since appellant "admitted in his return that appellee had properly exhausted . . . state remedies," appellant "cannot raise [exhaustion] on appeal for the first time in this Court." (Brief for Appellee, 4). This is not accurate.

Appellant, in his return, stated that he admitted the allegations contained in the following sentence of the habeas corpus petition, to wit:

> "The petitioner has satisfied the requirements of 28 U.S.C. §2254 by prosecuting an appeal on exception to the Supreme Judicial Court of Massachusetts wherein the petitioner *assigned as error* the deprivation of constitutional rights herein complained of." (Emphasis supplied) (App. 43).

A reading of appellee's Amended Bill of Exceptions (App. 1) filed in the Supreme Judicial Court of Massachusetts would lead one to believe that appellee had fully presented the vagueness issue to the highest state court. But this "assignment of error" was never argued to the Supreme Judicial Court — nor, for that matter, was it argued to the federal district court.

The issue of whether appellee had exhausted his state remedies on the facial vagueness of the Massachusetts statute did not become evident until the First Circuit Court delivered its opinion. That opinion rightly noted that the "concepts of vagueness and overbreadth are fraternal, not identical twins, having affinity but separate identities and purposes . . . ." (Jur. St. 23). The Court made this distinction despite the rather garbled briefs of the appellant and appellee which briefs argued, essentially, First Amendment overbreadth. However, once the First Circuit spoke of whether the flag statute gave fair notice

on its face of what conduct the statute proscribed, it became clear that the substance of this argument had never been presented to the Supreme Judicial Court.

Of course, the appellant never intended to waive the issue of exhaustion of state remedies and was well aware that, at least in the First Circuit, "[t]he doctrine of exhaustion . . . is not a matter for waiver by counsel." *Needel* v. *Scafati*, 412 F.2d 761, 766, *cert. den.* 396 U.S. 861 (1969). To insure that this case was presented to the federal courts in the same manner that it came before the Supreme Judicial Court, appellant made certain that the state court briefs were included in the record that was submitted to the federal district court (App. 46). Because the Supreme Judicial Court had issued a rescript opinion, a submission of the state court briefs was doubly necessary in this case. The briefs enabled one to place the conclusions found in the short opinion into a workable context.[1] It was assumed that the Amended Bill of Exceptions, the state court briefs and the Supreme Judicial Court opinion would act as an effective guide in delineating the precise constitutional questions that were before the federal district court.

II. The Substance of a Facial Vagueness Claim Was Never Made to the Supreme Judicial Court.

Appellee tells us at page eight of his brief that "[t]he essence of a claim that a statute is vague is that it is a violation of the Fourteenth Amendment's guarantee of due process of law to impose criminal penalties under a statute which does not give adequate notice of the pro-

[1] The "workable context" was intended not only for the federal court but also for the Commonwealth's Attorney General Office which Office became counsel for appellant once the federal habeas corpus petition was filed.

scribed conduct." However, as can be seen from a search of appellee's brief in the Supreme Judicial Court (App. 8-28), the "essence" of the vagueness issue was never presented to the Commonwealth's highest court. Nor were any of the "trappings" of a Fourteenth Amendment vagueness argument made in the state court.

A close study of the state court brief shows that neither a "facial" nor an "as applied" vagueness argument was made. Accordingly, it would have been permissible for the Supreme Judicial Court to decide the case solely on the basis of overbreadth considerations rather than finding "no vagueness in the statute as applied here." (App. 37). However, the state court having made the above finding, the issue of "vagueness as applied" was properly before the federal courts.

In *Picard* v. *Connor*, 404 U.S. 270 (1971) this Court held (at 278) "that the substance of a federal habeas corpus claim must first be presented to the state courts." Appellee[2] has failed to meet that standard in this case. See *United States ex rel. Nelson* v. *Zelker*, 465 F.2d 1121, 1123-25 (2nd Cir.), *cert. den.* 409 U.S. 1045 (1972); *Ferguson* v. *Cox*, 464 F.2d 461 (4th Cir. 1972); *United States ex rel. Blyden* v. *Singerman*, 350 F. Supp. 246 (S.D.N.Y. 1972).

III. Appellee's Reliance on a Supposed Admission of Appellant at Oral Argument Before the First Circuit Court Is Misplaced.

Appellee makes much of a statement in the First Circuit Court opinion to the effect that appellant admitted that two people could use the flag in the same manner with the

[2] Appellee has been represented by experienced, competent counsel at all stages of his case. Admittedly, a somewhat lessened standard might apply for "pro se" petitioners.

result that one would be prosecuted while the other would not. (Brief for Appellee, 9, 20, 25 n. 17). 471 F.2d at 102, Jur. St. 44. Appellee's reliance on this statement is unfortunate because appellant made no such admission.

At oral argument the First Circuit posed a hypothetical to the effect that two people, one a war veteran, the other a war protester, used the flag as a head covering to avoid getting wet as they left their respective rallies. Would both or either be prosecuted under the Massachusetts statute? Appellant answered that on the sole facts presented in the hypothetical neither would be prosecuted. The statute is not directed at inadvertent acts. Intent has to be proven to establish a violation of the statute. Where the conduct involved is egregious (e.g. trampling upon a flag) intent is readily inferable from the act itself. However, the more ambiguous the conduct involving the flag becomes, the more important become other elements that evidence intent. Eventually a point is reached where no matter how obvious a person's contempt for the flag might be, the specific flag conduct engaged in is not proscribed by the statute. For example, a person could hold up a flag and speak all manner of vile and defiant opinions about it. Absent conduct that touches the physical integrity of the flag he has not violated the Massachusetts statute.

Such a situation is not presented by the instant case.

Conclusion

For the reasons stated in his brief and in this reply brief, appellant respectfully requests this Court to reverse the judgment of the court below.

Dated: Boston, Massachusetts, November 5, 1973.

Respectfully submitted,

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